BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DANNA COPELAND	)	
Claimant	)	
VS.	)	
	)	Docket No. 244,497
USD 259	)	
Respondent	)	
Self Insured	)	

ORDER

The respondent requested review of the Award dated October 26, 2000, entered by Administrative Law Judge Jon L. Frobish. The Board heard oral argument on April 13, 2001 in Wichita, Kansas.

APPEARANCES

Roger A. Riedmiller of Wichita, Kansas, appeared on behalf of claimant. Robert G. Martin of Wichita, Kansas, appeared on behalf of respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge awarded claimant a 33 percent work disability by averaging a 21 percent task loss with a 45 percent wage loss.

On review respondent contends that claimant did not make a good faith effort to obtain employment and, therefore, a wage should be imputed to claimant based upon her wage-earning ability. More specifically, respondent argues that, beginning with the date claimant found employment post injury, a wage should be imputed based upon what she could earn at that job if she worked a full 40-hour work week.

Claimant contends that the Award of the Administrative Law Judge should be affirmed.

FINDINGS OF FACT

After reviewing the record, considering the briefs and hearing the parties' arguments, the Board finds that the Award should be affirmed.

Claimant worked for respondent school district as a paraprofessional or teacher's aide.

On May 7, 1999, claimant was injured when she had ahold of a doorknob and a librarian opened the door from the other side. Claimant continued to work for respondent, completing the school year. Her contract period expired on June 7, 1999. Claimant's contract was not renewed for the following school year. Claimant attempted to obtain paraprofessional work with respondent on several occasions but was not rehired.

Following the injury, claimant was treated by Dr. Frederick Smith. He ordered physical therapy and eventually released claimant on November 2, 1999 to full duty with no permanent restrictions. At his deposition, however, he agreed with the restrictions recommended by Dr. C. Reiff Brown as well as Dr. Brown's task loss opinion.

At the time of her April 21, 2000 deposition, claimant was enrolled in 9 credit hours at Wichita State University and was also looking for work. Claimant said she could work 35-40 hours per week in addition to her school work. She did not recall all of the places she had applied, but recalled applying for a bookkeeping job at Taylor's Detail Shop, two private duty home health care jobs, some home health care agencies and about eight or nine other places since January 2000. She reported receiving unemployment compensation from July 1999 until the end of October 1999 when her eligibility ran out. She was actively looking for work during that time period as well. She estimates contacting two or three employers a week, or 10-15 a month, while receiving unemployment benefits. However, she also reported that she was unable to complete her fall semester course work due to not being able to sit long periods, her hands would cramp from writing too long and her neck would get stiff from looking down. She attributed her neck stiffness and problems with sitting to her work-related injury.

The record consists of the testimony of two physicians, Dr. Smith and Dr. Brown. Dr. Brown saw claimant on January 10, 2000 at her attorney's request. He diagnosed claimant with right scapular muscle sprain and myofascial pain syndrome in the same area of musculature. Dr. Brown recommended restrictions of avoiding heavy frequent use of the upper extremities and upper spine, however, it was equally important for her to remain involved in light repetitive activities involving these areas of the body. Both Dr. Brown and Dr. Smith rated the claimant with a 5 percent permanent impairment to the body as a whole. Dr. Brown reviewed the task list prepared by Jerry Hardin and opined that claimant had lost the ability to perform 21 percent of the job tasks claimant had performed during the relevant 15-year period before her accident.

CONCLUSIONS OF LAW

Because claimant suffered an "unscheduled" injury, the permanent partial general disability rating is determined by the formula set forth in K.S.A. 1998 Supp. 44-510e, which provides in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of Foulk[1] and Copeland.[2] In Foulk, the Court of Appeals held that a worker could not avoid the presumption of having no work disability contained in K.S.A. 1988 Supp. 44-510e (the above quoted statute's predecessor) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. Neither the presumption nor the wage earning ability test are in the current statute, but in reconciling the principles of Foulk to the new statute, the Court of Appeals in Copeland held that for purposes of the wage loss prong of K.S.A. 44-510e, a worker's post-injury wages should be based upon his or her ability rather than actual wages when the worker fails to make a good faith effort to find appropriate employment after recovering from the injury.[3]

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.[4]

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[1] Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140, *rev. denied* 257 Kan. 1091 (1995).

[2] Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[3] *See* Gadberry v. R. L. Polk & Co., 25 Kan. App. 2d 800, 802, 975 P.2d 807 (1998).

[4] Copeland at 320.

The Award of the Administrative Law Judge determined that claimant made a good faith effort to find employment. Respondent disputes this finding and argues that beginning with her acceptance of a part-time job with Life Care Center of Wichita (Life Care), a wage should be imputed because claimant had not made a good faith effort to find full-time employment. Respondent suggests that a wage should be imputed to the claimant beginning July 1, 2000, for the wage loss prong of the work disability test, based upon what claimant could earn if she were working full time at Life Care.

Following her termination with respondent, claimant eventually obtained a job working with Life Care making $7.00 an hour, $8.00 an hour on weekends, and averaging 20-25 hours per week. Claimant asked for more hours, but they were not available. Her supervisor did tell her, however, that there was a possibility of her getting 35-40 hours later. Claimant was not asked whether or not she was still looking for other full-time employment, but her Regular Hearing testimony was given less than two weeks after she started at Life Care. It would be premature to conclude that claimant cannot get more hours at Life Care and therefore should be looking for full-time work elsewhere. Therefore, even though there were no medical restrictions that would prevent claimant from working a 40-hour work week, under the facts of this case the Board concludes that she has made a good faith effort to find appropriate employment. Therefore, the ALJ did not err by using claimant's actual wage to determine wage loss.

The Board finds that claimant has met her burden of proof to establish that she has a 45 percent wage loss. The ALJ's finding of a 21 percent task loss is not disputed. Combining the 21 percent task loss with the 45 percent wage loss results in a work disability of 33 percent.[5]

AWARD

WHEREFORE, the Board finds the Award dated October 26, 2000, entered by Administrative Law Judge Jon L. Frobish should be, and is hereby, affirmed.

IT IS SO ORDERED.

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[5] During the one month time period following her accident that claimant was still working for respondent and earning the same wage, she would be limited to a permanent partial disability award based upon her percentage of functional impairment. Also, during the time period claimant was unemployed and actively seeking employment, she would be entitled to a 100 percent wage loss. However, in this case the permanent partial disability benefits would not change by including these figures in the work disability computation. Therefore, the Board need not modify the ALJ's award calculation.

Dated this ____ day of April 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger A. Riedmiller, Wichita, KS
Robert G. Martin, Wichita, KS
Joseph Seiwert, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director